SUPREME COURT, U.S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1253

THE OPERATING ENGINEERS PENSION TRUST,

Petitioner,

vs.

BETTY LOU LIONBERGER,

Respondent.

Supplemental Brief in Support of Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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Supplemental Brief in Support of Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner submits this supplemental brief to reply to an argument first raised in the respondent's brief and to call attention to intervening matter not available at the filing of the Petition for Writ of Certiorari.

REASONS FOR GRANTING THIS WRIT.

1. The Joint and Survivor Annuity Is the Standard Form of Benefit Mandated by ERISA and Provided by the Operating Engineers Pension Plan, Not an Optional Form to Be Elected by a Participant.

According to the Provisions of the Operating Engineers Pension Plan (''Plan''), a pension *shall* be paid to a married participant in the form of a joint and survivor annuity (the

"Husband and Wife Pension") unless the participant has filed with the Trustees a timely written rejection of that form of pension (C.T. p. 104).[1]

This provision complies with § 205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), which requires the joint and survivor pension unless the participant takes affirmative steps to reject this form of pension. Therefore, the appellate court's rationale for its order preventing the Operating Engineers Pension Trust ("Trust") from paying benefits to Robert W. Lionberger ("Husband") in the form of a joint and survivor annuity is faulty. The appellate court reasoned, and the respondent has argued in her brief to this Court, that an *election* of the joint and survivor annuity provisions of the Plan would reduce the monthly income payable during the Husband's life and consequently diminish the respondent's community interest. The acceptance of the joint and survivor annuity provided by the Plan and mandated by ERISA does not, however, diminish the monetary value of the non-employee spouse's alleged community interest in pension benefits because that is the form of pension provided unless the alternate form is chosen. The participant's rejection of the joint and survivor annuity could, of course, augment the non-employee spouse's interest in pension benefits. The appellate court's order preventing the Trust from paying benefits in the form of a joint and survivor annuity to the Husband accomplished this augmentation by judicial fiat. As a result the plan participant has been denied the opportunity to provide a lifetime pension for his surviving spouse and the Trust is forced to violate ERISA unless it chooses to disobey the Court's order.

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[1]"C.T." refers to the Clerk's Transcript of the Superior Court proceedings conducted below.

2. The Secretary of Labor Has Concluded That the Type of Order Issued by the Court Below Is Preempted by ERISA.

The Secretary of Labor in his brief *amicus curiae* in *Stone v. Stone*, No. 78-2313, on appeal to the United States Court of Appeals for the Ninth Circuit, although suggesting an implied exception to the anti-assignment provisions of ERISA [29 U.S.C. § 1056(d)], has argued forcefully that ERISA preempts community property law. The Secretary recognized the serious threat of state court orders in favor of nonparticipant spouses conflicting with rights guaranteed to the participant by ERISA. That threat was realized in the present case.[2]

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[2]The Secretary argued as follows: "Community property law if not preempted might also provide a means to the non-participant spouse to interfere with an employee's rights under his plan. Prior to the passage of ERISA, employee benefit plans provided a variety of benefits for participants. Early retirement options, choice of form of benefit, choices of beneficiary and a host of other options intended to allow a participant to tailor his plan benefit to individual needs were provided by many plans. ERISA does not circumscribe this variety except for setting certain minimum standards; on the contrary, it supports a participant's rights by imposing a duty on fiduciaries to act in accordance with plan provisions and by making it a federal offense to interfere with those rights. *See* 29 U.S.C. 1104(a)(1)(D) and 1140.

"California and the other community property states have various provisions defining the rights of spouses in managing the community's property. The exercise of these rights may be inconsistent with federally guaranteed participant rights. For example, Section 205 of ERISA, 29 U.S.C. 1055, provides that if a plan offers its retirement benefit in the form of an annuity, it must allow the participant to elect a joint and survivor annuity. Under this option, the participant may choose to receive an actuarially reduced annuity during his or her own lifetime in exchange for an annuity to be paid to his or her surviving spouse. In the case of a participant who chooses this option to protect a second spouse, the first spouse (who under state law would have a recognized community property interest in the pension payment) will be adversely affected by the actuarial reduction in the amount of the pension benefit payment. But under ERISA, the participant must be permitted the election and, despite any 'property' interest, the first spouse must be precluded from interfering with the participant's choice."

Even if the choice of a joint and survivor annuity reduces the interest of a non-employee spouse, state law must nevertheless yield to the controlling federal law. The need for uniform national standards under ERISA dicates that plan participants and their surviving spouses must be given the same protection in community property states as their counterparts in the rest of the nation.

The Secretary of Labor suggested in his brief in *Stone v. Stone* that *In Re Marriage of Brown*, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561 (1976), would dispose of the potential problem of interference by the non-participant spouse in the election by the participant spouse of the joint and survivor annuity mandated by ERISA. The Secretary suggested that, because *Brown* recognized the right of the employee spouse to define the nature of the retirement benefits owned by the community, the interference would be precluded by state law. The appellate court in the present case, however, rejected the *Brown* argument reasoning that the only modification that could be made by the employee spouse would be one that was "non-detrimental" to the non-employee spouse.

3. A Proliferation of Recent State Court Orders Encroach Even More Seriously on the Provisions and Policies of ERISA by Disposing of Death Benefits and Awarding Attorneys Fees to the Non-Participant Spouse.

Apparently emboldened by the appellate court decisions in California which have determined that ERISA does not preempt California community property law, and by this Court's declining to review several of these cases, both the state trial courts and the family law bar in California have accelerated their assault on employee benefit plans.

Under Section 4363.1 of the California Civil Code, the clerk of the court is required to enter an order joining an employee pension benefit plan as a party to a marital dissolution proceeding when any party to the proceeding claims an interest in the plan and makes written application for joinder of the plan. After the joinder is accomplished, the courts have routinely subordinated the provisions of ERISA and the terms of the employee benefit plan to the goal of providing protection for the claimed community property interest of the non-employee spouse.

One court has virtually rewritten the provisions of the Plan of this Trust to accommodate the interest of the non-employee spouse.[3]

In other cases, the non-employee spouses have demanded that employee benefit plans pay their attorney fees for all litigation pertaining to community property rights in the

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[3]In the case *In Re the Marriage of Mantor* (April 23, 1980, 2 Civ. 56395), . . . Cal.App.3d . . . the Operating Engineers Pension Trust was joined in a marital dissolution proceeding and objected to the trial court's order directing the Trust to pay a portion of the employee spouse's pension benefits directly to the non-employee spouse. The Trust also objected to a provision in the order which declared that when the employee spouse died, the non-employee spouse would receive "as her sole and separate property, the remainder of any sums of money left in said Operating Engineers Trust Fund." The Trust urged the Appellate Court to reverse the trial court's order because of the order's conflict with the anti-assignment provisions of ERISA [29 U.S.C. 1056(d] and other substantive provisions of the federal law. The Trust also urged the Appellate Court to reverse the trial court's orders concerning death benefits because even under state law the non-employee spouse has no community property interest in such benefits. It was pointed out to the Court that under the terms of the Operating Engineers Pension Plan if benefits are payable on the death of the participant, it is the *surviving spouse* who receives the benefits. Only if there is no surviving spouse do benefits become payable to a designated beneficiary. Nevertheless, the Appellate Court declared that payment of benefits may be made under the terms of the Plan to the participant's surviving spouse *or* his designated beneficiary and the Court reasoned that, because the participant had agreed to the disposition ordered by the court, the Trust was not harmed. The Appellate Court failed even to discuss the conflict between this disposition and the requirements of ERISA.

plans. Without this Court's guidance, every employee benefit plan which attempts to uphold the mandate of the federal law governing its plan will incur not only the substantial legal costs presenting its own position, but also risks the depletion of its assets by awards of attorney fees to the non-participant spouses claiming an interest in plan benefits.[4]

4. The Implied Exception Theory Advanced by the Solicitor General, Even if Strictly Limited, Is Unworkable and Should Yield to the Complete Preemption in ERISA.

The Solicitor General has concluded that ERISA preempts community property law, but that certain state court decisions, which direct employee benefit plans to pay benefits to the non-employee ex-spouse of a plan participant to satisfy a community property claim, can be upheld on the basis of an implied exception to the anti-assignment provisions of ERISA.[5] The Solicitor General reasoned that because

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[4]In the case *In Re Marriage of Reyes*, 97 Cal.App.3d 876, 159 Cal.Rptr. 84 (1979), the Court of Appeal of the State of California affirmed a trial court's order denying attorney fees to a non-employee spouse who sought the payment from an employee benefit plan joined in the proceeding. The Appellate Court found no basis in California law for an award of fees and rejected the argument of the non-employee spouse that she was entitled to the attorney fees under ERISA [29 U.S.C. § 1132(g] because she had failed to raise the argument at trial or in her opening brief on appeal. Thereafter, the non-employee spouse returned to the trial court requesting attorney fees incurred in opposing the appeal of the employee benefit plan. On April 18, 1980, the trial court, in Case No. 53008 in the Superior Court for the County of Merced, granted the request, stating: "The Court concludes that Section 4370 of the Civil Code does not bar this request for attorneys fees: Section 29 U.S.C. 1132(g) authorizes an allowance of reasonable attorneys fees, that Petitioner is a beneficiary by reason, at least of this Court's Order, and its affirmance on appeal. The jurisdiction of this Court to act on this request for allowance of fees continues."

some courts in common law jurisdiction have held that the anti-assignment provisions of ERISA (and certain other federal statutes with similar anti-assignment provisions) do not bar enforcement of *family support decrees* in common law states, that the non-employee ex-spouse in a community property state deserves the same protection.

The "implied exception" argument is unsound in theory and in practice. If § 514 preempts community property laws as the Solicitor General contends, then there is no legal foundation upon which to build the "implied exception" to the anti-assignment provisions of ERISA. To allow the order in the present case to stand would require an implied exception to the preemption statute (§ 514) permitting the community property laws to affect employee benefit plans, and a second "implied exception" to the anti-assignment provisions to place common law states in the same position as community property states.

In practice, an "implied exception" to the express preemption clause of ERISA will be impossible to limit. The slightest opening in the preemption curtain will be used as a license by state courts for all manner of orders affecting the administration of pension plans. Even without such a license, the experience to this date has given plentiful examples of the willingness of the state courts to proceed in that direction.

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[5]The Solicitor General in his brief before this Court as *amicus curiae* in cases No. 78-1422, Retirement Fund Trust of the Plumbing, Heating, and Piping Industry of Southern California v. Johns, and No. 78-1445, Southern California IBEW-NECA Pension Plan v. Johnston, stated as follows: "Although the courts below erred in concluding that § 514 does not preempt state community property law, we believe that their judgments are correct on the basis of an implied exception to the anti-assignment provisions of ERISA."

The implied exception argument would, of course, not be applicable to the holding by the appellate court below which barred the Operating Engineers Pension Trust from paying benefits to the Husband in the form of a joint and survivor annuity.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

May, 1980.

Respectfully submitted,

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APPENDIX.

Statutory Provisions Involved.

1. Section 205 of Erisa, 29 U.S.C. §1055 provides, in pertinent part:

(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

2. Section 206 of Erisa, 29 U.S.C. §1056 provides, in pertinent part:

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

3. Section 404 of Erisa, 29 U.S.C. § 1104 provides, in pertinent part:

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this sub-chapter.

4. Section 502 of Erisa, 29 U.S.C. §1132 provides, in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan:

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provisions of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

5. Section 510 of Erisa, 29 U.S.C. §1140 provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a partic-

ipant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

6. Section 514 of Erisa, 29 U.S.C. §1144 provides, in pertinent part:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

7. California Civil Code § 4363.1 provides, in pertinent part:

(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court.

8. California Civil Code § 4370 provides, in pertinent part:

(a) During the pendency of any proceeding under this part, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the orginial award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding relating thereto. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter augment or modify any award so made. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding.